

DONNA M. GARONE
Claimant

WENDY'S

Respondent

LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

Docket No. 1,025,067

Respondent and its insurance carrier (respondent) request review of the December 29, 2005 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

The Administrative Law Judge (ALJ) found that claimant's injury arose out of and in the course of her employment and ordered medical treatment and temporary total disability benefits to be paid by respondent.

Respondent requests review of the ALJ's finding that claimant's injury arose out of and in the course of her employment. Respondent asserts that claimant did not have any problems on the claimed date of accident but that she bent over the next day at home and was unable to straighten up. Therefore, respondent asserts that claimant did not suffer a work-related injury but instead injured herself at home. Respondent also notes that claimant did not mention to her supervisor that she had a work-related injury until after her family doctor referred her to a spine specialist. Also, respondent contends that claimant is not entitled to temporary total disability compensation because she has not presented respondent with any restrictions that would prevent her from working after August 15, 2005.

Claimant argues that she experienced a dull pain in her lower back after working her shift on August 8, 2005. The next day, she bent over and could not straighten back up. Claimant attributes this condition to the strenuous physical activity required of her at work

on August 8, 2005. She denies any prior back problems and claims she has not had any type of accident away from work that could be the cause of her current back complaints. Accordingly, claimant requests that the ALJ's order for medical treatment and temporary total disability benefits be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was the only witness to testify before the ALJ at the October 13, 2005 Preliminary Hearing. She said that she worked for respondent as a crew leader and was considered part-time even though she generally worked a 40-hour week. Her job required her to lift 5-gallon pails of ice and leftover chili, boxes containing 48 heads of lettuce and 40-pound boxes of meat. On Monday, August 8, 2005, claimant arrived at work at 6:10 to 6:15 a.m. and started working her eight-hour shift. She did not testify about a specific incident causing her injury but stated that the items she lifted were heavy. She testified that on Monday evening she suffered from a dull pain in her low back. She was not scheduled to work the next day and was at home when she bent over and could not straighten back up. The pain was in the center of her low back. Claimant testified that she went to work on Wednesday, August 10, 2005, but was still in pain and had to have help lifting meat from the freezer. On Thursday, claimant made an appointment with her personal physician for the next day. She told her supervisor, Grace Phillips, only that she was seeing the doctor because of back pain but did not say the pain was work-related.

On Friday, August 12, claimant was seen by Sharon Frank, a nurse practitioner in the office of Dr. J. Sack. Ms. Frank's medical records for that date indicate that there was no actual injury to claimant's back. The records show that claimant worked in a fast food restaurant but indicate that she had not been doing a great deal of lifting. Claimant denied telling Ms. Frank that she had not been lifting at work. Claimant stated she told Ms. Frank that she was pretty sure her condition was work-related, however, this is not mentioned in the medical records. Ms. Frank took an x-ray of claimant's back and gave her a note releasing her from work until Monday, August 15, 2005, when an MRI would be performed. The MRI showed:

1. Marked to severe central spinal canal stenosis with bilateral neuroforaminal narrowing at L3-4. Findings are secondary to grade 1 anterior spondylolisthesis of L3 on L4 as well as posterior disc bulge at this level.
2. Degenerative disc disease at L3-4 as well as L5-S1.¹

¹P.H. Trans., Cl. Ex. 1 at 3.

Claimant was referred to Dr. Henry with the Abay Clinic. She testified that Dr. Henry recommended she have surgery on her back.

On August 15, the day claimant had the MRI, she told Ms. Phillips that her problems were work-related. She told Ms. Phillips that the cause of her condition was the lifting she did on August 8, 2005. She has had no other accidents or incidents that caused her to injure her back.

Claimant has not been told by anyone from Dr. Sack's office or the Abay Clinic that she can return to work in her current condition. She has not presented any restrictions to respondent; however, she testified that Ms. Phillips was aware that she was under restrictions. Claimant continues to have pain in her low back, and her right leg is numb down to her knee. She has not worked since August 11, 2005.

The evidentiary deposition of Grace Phillips was taken on October 14, 2005. She is the general manager of the restaurant where claimant worked for respondent and is claimant's supervisor. She corroborated claimant's testimony concerning her job duties, including the lifting of the pails of chili and the boxes of meat. She stated, however, that the boxes of lettuce contained 24 heads, not 48 as was testified to by the claimant. She also testified that claimant is a part-time employee and has no fringe benefits.

On August 11, 2005, claimant told Ms. Phillips that she had a doctor's appointment the next day. On Friday, August 12, claimant gave Ms. Phillips an excuse from the doctor saying she could not work until the following Monday. The next Tuesday, Ms. Phillips telephoned claimant to follow up, and claimant told her that the doctor said she had two slipped discs and they were going to do further testing. Ms. Phillips denied that claimant told her that her condition was work related at that time. She stated that claimant did not tell her she was alleging a workers compensation injury until the next Thursday, August 18. Ms. Phillips was not asked whether claimant had notified her of any work restrictions other than the release stating claimant was to be off work on Monday, August 15, until after the MRI was done.

The MRI findings suggest claimant's back problems likely preexisted the date of her alleged accident. Although there is no evidence that claimant's preexisting back condition was symptomatic, there is also no expert medical opinion relating claimant's present symptoms to her activities at work. Given that the most significant onset of claimant's symptoms occurred at home rather than at work, the Board considers such a medical causation opinion to be necessary in this case for claimant to sustain her burden of proof. In the absence of any medical expert relating claimant's episode at home on August 9, 2005, to her work activities the day before, the Board finds that claimant has failed to prove her injury arose out of and in the course of her employment with respondent.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated December 29, 2005, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2006.

BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director